No. 14460

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UMESO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This is an appeal from the District Court's order dismissing the action on the ground of lack of jurisdiction over the subject matter [R. 18].

The action is under 8 U. S. C. 903 for a declaration pursuant to that section that plaintiff is a national of the United States [R. 3-6].

The District Court had jurisdiction under 8 U. S. C. 903. The order of Dismissal was filed on May 24, 1954.

Notice of Appeal was filed on July 1, 1954. This Court has jurisdiction to review the order of dismissal under 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Plaintiff filed an amended and supplemental complaint, the amending portions of which were filed as of course under Rule 15(a), Federal Rules of Civil Procedure, no responsive pleading having been served or filed [R. 6]; and the supplementary portions of which were allowed to be filed by the trial court [R. 22, 29], after notice of motion for leave to file same [R. 9, 13], and over the objections of defendant [R. 15, 28].

The question as to whether the court had jurisdiction over the subject matter was raised by defendant by way of objection to the filing of the amended and supplemental complaint [R. 15, 16, 17], and by way of motion to dismiss [R. 11, 29].

Statutes Involved.

8 U. S. C. 903, under which the complaint was filed, provides in pertinent part:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person . . . may institute an action against the head of such Department or agency . . . in the district court of the United States for the district in which

such person claims a residence for a judgment declaring him to be a national of the United States . . ."

Section 405a of the Immigration and Nationality Act, 1952 (66 Stat. 166, *et seq.*), the "saving clause" provides in pertinent part (note to 8 U. S. C. 1101):

> "(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (*sic*), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Facts.

The pertinent facts alleged, deemed admitted by the motion to dismiss, are these:

Plaintiff was born in Hawaii on August 30, 1911 [R. 6], and, therefore, was born a citizen of the United States (14th Amend, U. S. Const.).

On or about October 17, 1952, plaintiff applied at the office of the American Vice Consul at Kobe, Japan, for registration as a citizen of the United States [R. 7].

(See 22 C. F. R. 107.2.) The Vice Consul denied such application for registration on the ground that plaintiff had lost his United States citizenship under 8 U. S. C. 801(c) by reason of plaintiff having served in the Japanese Armed Forces [R. 7]. Instead of registering plaintiff as a United States citizen as applied for, the Vice Consul, on November 20, 1952, executed under his official seal as Vice Consul of the United States, a Certificate (as to plaintiff) of the Loss of the Nationality of the United States on the ground of said Japanese Military Service [R. 7]. The Washington office of Department of State, on December 18, 1952, approved this action taken by the Vice Consul at Kobe [R. 14].

In so acting, the Vice Consul at Kobe, Japan, as well as the Washington office of the Department of State, acted as agents for and on behalf of the defendant, Secretary of State [R. 7, 8].

Plaintiff claims Hawaii as his permanent residence [R. 6].

Plaintiff prayed for a judgment declaring that he is a national of the United States [R. 8].

The original complaint was filed on December 16, 1954 [R. 3-6, 28]. The Immigration and Nationality Act, 1952, went into effect on December 24, 1952 (note to 8 U. S. C. 1101). By its savings clause (Sec, 405(a)(c); note to 8 U. S. C. 1101), 8 U. S. C. 903 and 801(c) were continued in force and effect. The amending portions (setting forth the actual denial of the application for regis-

tration and the execution by the Vice Consul of the Certificate of Loss on November 20, 1952 [R. 7]) of the amended and supplemental complaint were filed as of course on March 15, 1954 [R. 6-8, 28]. Notice of Motion for leave to file the supplemental portions (setting forth the approval in Washington of the Vice Consul's action) was filed on March 18, 1954 [R. 10, 28]. Notice of Motion to Correct the Supplemental Portions (showing the date of the Washington action as being December 18, 1952 [R. 14]) was filed in April 19, 1954 [R. 13-14, 29].

Defendant's Motion to Dismiss the amended complaint on the ground that the court lacked jurisdiction over the subject matter was filed on March 23, 1954 [R. 11, 29]. The court's order allowing the correction of the supplemental portions of the Amended and Supplemental Complaint was made on April 20, 1954 [R. 16, 29; *cf.* R. 22]. Its oral order dismissing the action for lack of jurisdiction was made on April 21, 1954 [R. 17, 29]. The formal written order of dismissal was filed on May 24, 1954 [R. 18, 29]. The court's opinion was filed on June 23, 1954 [R. 18-27, 29]. The opinion is reported at 122 Fed. Supp. 260.

Specification of Errors.

1. The District Court erred in dismissing the action;

2. The District Court erred in ruling that it lacked jurisdiction over the subject matter of the action.

ARGUMENT.

Summary of Argument.

1. It is not necessary to decide whether the original complaint [R. 3-6] stated a cause of action under 8 U. S. C. 903, although plaintiff believes it did;

2. The amended complaint [R. 6-8], filed as a course, no responsive pleading having been served or filed, disregarding the portions supplementary to the date of the filing of the original complaint, relates back to the date of the filing (Rule 15(c), Federal Rules of Civil Procedure), and succinctly spells out all the elements of 8 U. S. C. 903; (1) prior to the filing of suit, plaintiff claimed a right or privilege as a national of the United States (the right or privilege to be registered by the American Vice Consul as a national of the United States living abroad) [R. 7]; (2) prior to filing of suit, he was denied that right (registration) by the Vice Consul and instead the Vice Consul executed as to him a Certificate of the Loss of the Nationality of the United States [R. 7]; (3) upon the ground that plaintiff was not a national of the United States (the Vice Consul ruling that plaintiff had lost his United States citizenship under 8 U. S. C. 801(c), by reason of having served in the Japanese Armed Forces) [R. 7]; (4) plaintiff seeks a declaration that he is a national of the United States [R. 8]; (5) in the District Court of the United States for the district wherein he claims permanent residence [R. 6].

Under 8 U. S. C. 903, nothing more is needed.

3. It is not, therefore, even necessary to consider whether the supplementary portions of the Amended and Supplemental Complaint, which the court allowed to be

filed, supply any missing allegations, because none was missing. There was no provision under 8 U. S. C. 903 (*cf.*, 8 U. S. 1503 (a) and (c) under the 1952 Act), for any exhaustion of administrative remedies. If such were required, however, these remedies were exhausted on December 18, 1952, when the Washington office of the State Department approved the Certificate of the Loss of Nationality which the Vice Consul had previously made. All this occurred before the effective date (December 24, 1952) of the 1952 Act.

4. The fact that the effective date of the 1952 act occurred before plaintiff filed his amended complaint and his motion for leave to file the supplementary portions thereof, is of no moment because the savings clause of the 1952 act preserved plaintiff's right so to do.

I.

The Sufficiency of the Original Complaint Need Not Be Considered Here.

Inasmuch as it was the duty of the Vice Consul to register an American national living abroad (8 C. F. R. 1072), and this was clearly not done [R. 4], it would seem that the requirements of the statute were met even based upon the allegations of the original complaint as filed. (*Cf., Lee Wing Hong v. Dulles,* 214 F. 2d 753, 756, 757 (C. A. 7, 1954) *Chin Ming How v. Dulles,* 118 Fed. Supp. 490, 493 (D. C. S. D. N. Y., 1953).

However, as indicated, this question need not be decided because the amended complaint clearly complied completely with the statute.

II.

The Amended Complaint Complies With 8 U. S. C. 903.

As previously pointed out under the statement of facts, the District Court rendered a written opinion [R. 18-27]. It was made and filed subsequent (June 23, 1953) [R. 27, 29]; to the court's formal written order of dismissal (May 24, 1954) [R. 17, 18, 29]. And, although the court's opinion, even had it been rendered before or concurrently with the order, is not technically part of the record as such (*Brooks v. Brooks Clothing of Calif.,* 5 F. R. D. 14, 17 (D. C. S. D. Cal., 1945); *Bowles v. Dodge,* 141 F. 2d 969, 970 (C. C. A. 9, 1944), it nevertheless may be looked to as indicating the reasoning of the trial court (*Bowles v. Dodge, supra; Takehara v. Dulles,* 205 F. 2d 560, 561 (C. A. 9, 1953)). Upon doing so, we find that the whole rationale of the trial court's reasoning is based upon the erroneous theory that even though there was a denial of the application for registration by the defendant, there was no denial within the meaning of 8 U. S. C. 903 because this action of the defendant was "uncommunicated to the plaintiff prior to the filing of the complaint" [R. 22]. This, despite the fact that the consular officials, charged with the duty of administering 8 U. S. C. 903, considered the denial to have taken place under the statute (whether it occurred when the Certificate of Loss was executed in Japan (November 20, 1954) [R. 7], or when the Washington office approved it (December 18, 1952) [R. 14]) and issued to plaintiff a Certificate of Identity under the statute to enable him to come to the United States for the trial [R. 7]. This interpretation by the defendant is significant in the light of the fact that the consulate officials in Japan are not noted for over zealous-

ness in the granting of Certificates of Identity under the provision of 8 U. S. C. 903 (*cf. Kawaguchi v. Acheson,* 184 F. 2d 310 (C. A. 9, 1950)).

Moreover, when it is considered that 8 U. S. C. 903 is remedial legislation and should therefore be liberally construed (*Furusho v. Acheson,* 94 Fed. Supp. 1021, 1023 (D. C. D. How., 1951), appl. dism.; *cf., Acheson v. Furusho,* 212 F. 2d 284 (C. A. 9, 1954), and *Perkins v. Elg.,* 307 U. S. 325), the error of the court's reasoning becomes even more apparent.

It is difficult to follow the trial court's logic. Certainly there is nothing in 8 U. S. C. 903 which spells out or *requires* the theory of communication. The statute does not call for knowledge of denial. It allows the suit upon their having been a denial. It would seem that the court's proviso calling for communication to the plaintiff is a re-writing of the statute. Courts, of course, have no such power (*Hague v. CIO,* 307 U. S. 496, 518; *United States v. Henning,* 344 U. S. 66, 76; *Pillsbury v. United Engineering Co.,* 342 U. S. 197, 199). All that the statute requires is that "any Department *or* agency *or* executive official thereof" deny the claimed right "upon the ground that (the person) is not a national of the United States." The court indicates that had plaintiff *known* of the Vice Consul's action prior to the filing of the action, it would have held that it had jurisdiction [R. 22]. This is pure formalism. When, on November 20, 1950, the Vice Consul refused to register plaintiff as a national of the United States and instead executed under official seal, as to plaintiff, a Certificate of the Loss of the Nationality of the United States, he effectively denied to plaintiff a right as a national of the United States. And under 8 U. S. C.

903, plaintiff was entitled to file a suit for court declaration at that moment. We submit that no other conclusion is possible and that that conclusion follows from what this court has previously said in *Wong Wing Foo v. Dulles,* 196 F. 2d 120, 122 (C. A. 9, 1952), and what other courts have said in related situations (*Linzalone v. Dulles,* 120 Fed. Supp. 107 (D. C. S. D. N. Y., 1954); *Chin Ming How v. Dulles,* 118 Fed. Supp. 490 (D. C. S. D. N. Y., 1953)).

In *Wada v. Dulles,* No. 14982 (D. C. S. D. Cal. Jan. 13, 1955), the court ruled in its Conclusion of Law No. VII (no opinion was written) that:

> "The execution by the American Vice-Consul at Kobe, on July 12, 1951, of the Certificate of Loss of the Nationality of the United States constituted a denial of a right or privilege to plaintiff as a national and citizen of the United States within the meaning of 8 U. S. C., Sec. 903."

Accord:

> *Miyata v. Dulles,* No. 14872 (D. C. S. D. Cal., Jan. 21, 1955) (Conclusion of Law No. II).

And in the *Wada* case, *supra,* the court held (Conclusion of Law No. IX) that:

> "Plaintiff was denied a right and privilege as a citizen of the United States within the meaning of 8 U. S. C., Section 903, even though prior to the filing of this action, he had not been notified of the loss of his citizenship, or formally denied his application for a passport to the United States."

Communication to the plaintiff adds nothing. The denial takes place the moment the Vice Consul refuses to register plaintiff as a national on the ground, as here, that plaintiff is not a citizen of the United States. While the precise moment when the Vice Consul subjectively made up his mind not to register plaintiff may be difficult to ascertain, there can be no question about the matter when, on November 20, 1952, under official seal the Vice Consul executed as to plaintiff the Certificate of the Loss of the Nationality of the United States on the ground that plaintiff had expatriated himself under 8 U. S. C. 801(c) by reason of his having served in the Japanese Armed Forces [R. 7].

In the *Wong Wing Foo* case (196 F. 2d at 122), this court pointed out that an action under 8 U. S. C. 903 properly lies "where a consul refuses to register a person as a United States national," citing *Acheson v. Kuniyuki* (9 Cir.), 189 F. 2d 741. And this Court (*ibid.*) held that the "section is largely invoked where there has been no administrative proceeding at all."

Accordingly it follows, we submit, that the denial under 8 U. S. C. 903, takes place at the time the Vice Consul refuses to act or at least when he executes the Certificate of Loss, not when plaintiff is told about it. The imparting of information to the plaintiff by the defendant, adds nothing to what he has already done, or refused to do.

III.

The Supplemental Complaint Stated a Claim Under 8 U. S. C. 903.

This feature of the case needs little discussion. As seen, the supplemental portions of the amended and supplemental complaint added, in so far as pertinent here, the fact that the State Department's office in Washington approved, on December 18, 1952, two days after the complaint was filed, the prior denial by the Vice Consul in Japan on November 20, 1952 [R. 7] when he executed the Certificate of Loss and refused to register plaintiff as a national of the United States.

In plaintiff's view, this did not take away the effect of the previous denial nor add to it. The action of the Washington office affirmed the action of the Vice Consul and did not reverse it. But it did no more than that.

In the trial court's view, even if approval by the Department's office in Washington was necessary to constitute a denial (a view, we submit, which is neither in the statute, nor contemplated by it and which is unwarranted from its terms), nevertheless, the court says, the statute was not complied with because it did not occur before the complaint was filed [R. 23]. In the light of the fact that the court did allow the filing of the supplemental portions of the amended and supplemental complaint, we do not understand the court's reasoning on this score. The court's view that the supplemental pleading would not be effective to cure the supposed invalidity or prematurity of the original complaint [R. 22], while in-

correct, would have been more logical had the court refused to allow the filing thereof. Had this been the case, the trial court would have been adopting the minority and less preferable view as to the allowance of amended and supplemental pleadings based on the notion that one cannot amend a non-existent action. This view as a ground for not allowing amended and supplemental pleadings has been thoroughly discredited (See *Hackner v. Guaranty Trust Co.,* 117 F. 2d 95, 98 (C. C. A. 2, 1941),[1] cert. den. 313 U. S. 559; 3 Moore, Fed. Practice 858, 859; concurring opinion in *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.,* 200 F. 2d 876, 879 (C. A. 2, 1952); *Genuth v. National Biscuit Co.,* 81 Fed. Supp. 213 (D. C. S. D. N. Y., 1948);[2] *Porter v. Block,* 156 F. 2d 264 (C. C. A. 4, 1946); *Hillgrove v. Wright Aeronautical Corp.,* 146 F. 2d 621 (C. C. A. 6, 1945).

But the question is not present in this case because the court *did* allow the supplemental pleading to be filed. [R. 16, 29; *cf.,* R. 22.]

Thus we are brought again to what is the crux of the trial court's view as to what constitutes a denial under 8 U. S. C. 903: that the fact of the denial must be communicated to the claimant before there is a denial under that section. The fallacy of that reasoning has been explained above.

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[1]"Defendant's claim that one cannot amend a non-existent action is purely formal, in the light of the wide and flexible content given to the concept of action under the new rules."

[2]"I see no reason why the plaintiffs should not be allowed to file the supplemental complaint despite the fact that the principal complaint is dismissed."

IV.

The Effect of the 1952 Act.

The trial court's discussion of the savings clause of the 1952 Act is likewise predicated upon the erroneous doctrine of communication. This, because if Washington approval was necessary, this approval occurred before the effective date of the 1952 Act, although not communicated to him until after.

The court speaks of the Savings Clause as applying only to "a valid suit, or a valid action" [R. 23]. However, an examination of the clause discloses no such requirement. When Congress intended that the Savings Clause apply only to a "valid" proceeding pending at the time the 1952 was to take effect, it said so. Thus in a portion of the Savings Clause not quoted by the court [R. 23], Congress said:

> "Nothing contained in this Act . . . shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding *which shall be valid at the time this Act shall take effect;* . . ." (Italics added.)

From the absence of the modifying words, italicized above, in the phrase which the court below quoted [R. 23], it is clear that Congress, by its broad Savings Clause, intended no change as to any suit, action or proceeding, civil or criminal, pending at the time the new act took effect. Thus the posture of the case is this (assuming that before there can be a denial under 8 U. S. C. 903,

there must be action in Washington): prior to December 16, 1952, the Vice-Consul took his action; on December 16, 1952 plaintiff filed his complaint; on December 18, 1952, after the complaint was filed, but before the new act took effect, the Washington action occurred. Assuming, unnecessarily we again assert, that this latter was the denial, plaintiff had the right under recognized rules of pleading to ask leave to file the supplemental facts. The suit, (action or proceeding) was certainly "existing" at the time the new act took effect, and by the savings clause, it and the statute under which it was filed was "hereby continued in force and effect." If the savings clause means anything, it means that this right to file the supplemental pleading continued. Otherwise Congress's language that "nothing contained in this Act . . . shall . . . affect any . . . suit, action, or proceedings, civil or criminal" is meaningless.

The Supreme Court has recently said (*De La Rama Steamship Co. v. United States,* 344 U. S. 386, 389):

> "We see no reason why a careful provision of Congress, keeping a repealed statute alive for a precise purpose, should not be respected when doing so will attain exactly that purpose."

Accordingly we are brought back to the central theme of the court's reasoning: that notice of the denial must be communicated to the claimant in Japan before there has been a denial under 8 U. S. C. 903, a concept, we respectfully submit, which has no support in the statute or in reason.

If plaintiff is correct in his argument that under 8 U. S. C. 903 there is a denial the very moment the consulate in Japan refused to register plaintiff and executed the certificate of loss, or, under the supplementary features of the case, the moment the office in Washington approved the consulate's action, the right to file the supplementary pleading and the jurisdiction on the trial court is clear.[3]

Conclusion.

The crux of this case lies in the reasoning of the trial court that before there can be a denial under 8 U. S. C. 903, there must be communication to the plaintiff. We think not. The denial is a fact the moment it is made, whether defendant tells plaintiff about it or not.

The order of dismissal should be set aside and the case permitted to proceed to trial.

Respectfully submitted,

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[3]Although the point need not be argued here, there is authority that under those circumstances, even a new suit, though filed after December 24, 1952, would lie. (See *Lang v. United States,* 133 Fed. 201 (C. C. A. 7, 1904); *De Four v. United States,* 260 Fed. 596 (C. C. A. 9, 1919); *Yucas v. United States,* 283 Fed. 20 (C. C. A. 7, 1922); *Great Northern Railway Co. v. United States,* 208 U. S. 452; *United States v. Reisinger,* 128 U. S. 398; *Quirk v. United States,* 161 F. 2d 138 (C. A. 8, 1947); *Stillman v. United States,* 177 F. 2d 607 (C. A. 9, 1949); *cf. NLRB v. National Garment Co.,* 166 F. 2d 233 (C. C. A. 8, 1949); *De La Rama Steamship Co. v. United States,* 344 U. S. 386; *United States v. Menasche,* 210 F. 2d 209 (C. A. 1, 1954); *Vanish v. Barber,* 211 F. 2d 467 (C. A. 9, 1954); *Ex parte Robles-Rubio,* 119 Fed. Supp. 610 (D. C., N. D. Cal. 1954); *United States ex rel de Luca v. O'Rourke,* 213 F. 2d 759 (C. A. 8, 1954).